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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-86

DONALD E. POWERS,
PLAINTIFF, PETITIONER,

v.

BETHLEHEM STEEL CORPORATION,
DEFENDANT, RESPONDENT,

v.

McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT,

and

DONALD E. POWERS,
PLAINTIFF, PETITIONER,

v.

McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Donald E. Powers, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review the judgments of

that Court entered on April 9, 1973 in the above-entitled actions pursuant to an Opinion rendered by that Court on the aforesaid date. A Petition for Rehearing was denied by said Court on May 10, 1973. The said judgments have been docketed and copies of those entries are appended hereto as Parts F and G of the Appendix. The judgments of April 9, 1973 are in the official record of the United States Court of Appeals for the First Circuit and copies are appended hereto as Parts D and E of the Appendix. The Memorandum and Order of May 10, 1973 denying rehearing is also in the official record and a copy is appended hereto as Part H of the Appendix.

I

Opinion Below

The opinion of April 9, 1973 of the United States Court of Appeals for the First Circuit does not yet appear in the official reporter. It is contained in the official record of said Court and a copy of said opinion is appended hereto as Part C of the Appendix. The Memorandum and Order of May 10, 1973 by the United States Court of Appeals for the First Circuit also does not appear in the official reporter. It is contained in the official record of said Court and a copy is appended hereto as Part H of the Appendix.

II

Jurisdiction

The judgments of the United States Court of Appeals for the First Circuit now sought to be reviewed were entered on April 9, 1973. Entry was made pursuant to an order dated that same day. On a Petition for Rehearing filed April 23, 1973, rehearing was denied on May 10,

1973. Entry of that denial was also made May 10, 1973. Therefore, this petition falls within the time prescriptions of Title 28 of the United States Code, Section 2101.

Jurisdiction to review the aforesaid proceedings exists by virtue of Title 28 of the United States Code, Section 1254.

III

Questions Presented

1. Is a raft a vessel for the purposes of the General Maritime Law?

2. Did a cause of action for negligence occurring on a raft in navigable waters arise within the scope of admiralty and maritime jurisdiction?

IV

Statutes Involved

The case involves the following statutes:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States of:
> (1) Any civil cases of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled . . ."
>
> 28 U.S.C. §1333 (1970), Vol. 7, p. 7568.
>
> "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."
>
> 1 U.S.C. §3 (1970), Vol. 1, p. 2.
>
> "The word 'vessel' includes every description of water craft or other contrivance used, or capable of

being used, as a means of transportation on water, but does not include aircraft."

19 U.S.C. §1401(a) (1970), Vol. 5, p. 4974.

"The term 'vessel' includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water."

46 U.S.C. §801 (1970), Vol. 10, p. 11469.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. §688 (1970), Vol. 10, p. 11451.

V

Statement of Facts

On or about October 6, 1967, the plaintiff, Donald E. Powers, was employed as a pile driver and dock builder

by the McKie Lighter Co., Inc. (hereafter McKie). In the course of his employment, the plaintiff was required to perform many duties on or about navigable waters. (R.A. 19-25, 28-32, 99, 284, 304, 305) These duties included the handling of dories, rafts and lighters. (R.A. 20-25) Often the plaintiff would serve as a deckhand aboard McKie vessels and assist in navigation. (R.A. 20-23, 28, 29, 31, 32, 43, 99, 260, 284, 285, 304, 305) While the plaintiff was navigating a raft owned by the defendant McKie on the aforesaid date, the plaintiff sustained grave personal injuries losing an eye and incurring substantial coronary damage. (R.A. 45-48, 258, 304, 305)

At the time of the injury, the plaintiff was standing aboard a raft approximately twenty-five feet long by five feet wide. It was positioned next to a pier owned, operated and controlled by Bethlehem Steel Corporation, (hereinafter Bethlehem). The raft was being used to transport men and equipment to work sites, activity which was typical of the manner in which the raft had been used by the plaintiff for nearly two months previously. (R.A. 25-32, 43, 45, 158, 260, 284, 285, 304) Indeed, the raft had been navigated on various occasions across great stretches of open water in order to perform similar tasks. (R.A. 28-32, 260, 284, 285)

The raft was being used by the defendant McKie in performance of its dockbuilding contract with the defendant Bethlehem. Under that contract, the defendant McKie was required to repair certain pilings supporting piers in a shipyard owned and operated by Bethlehem. (R.A. 357a). The work performed under that contract commenced in August of 1966. (R.A. 22). As a further part of that contract, it was the obligation and practice of the defendant Bethlehem to supply equipment to employees of the defendant McKie for dockbuilding and pile driving activities

on or near Bethlehem piers. (R.A. 27, 28, 33, 34, 39, 40, 50)

The accident occurred when a light supplied by Bethlehem exploded and bulb fragments entered the eye of the plaintiff. (R.A. 45-48, 288, 307).

The defendant Bethlehem had supplied to employees of the defendant McKie certain lighting facilities to illuminate working areas around and under the piers. On the day of the accident, an employee of the defendant Bethlehem gave to an employee of the defendant McKie a long cable with a plug at one end and a socket and bulb unit at the other without shields or reflectors. (R.A. 33, 34, 39-43, 258, 304-315) Bethlehem lighting equipment was often devoid of protective shields or reflectors in spite of the custom and practice in the dockbuilding industry to the contrary. (R.A. 33, 34, 39, 241, 242, 295, 315) It was also supplied in spite of prior complaints to officers of Bethlehem and of McKie that unprotected bulbs had been popping and that protected lighting was not always supplied. (R.A. 35, 37-39, 58, 59, 61, 121, 152, 153, 256, 261, 262, 289, 315)

The bulb exploded at approximately 5:30 a.m. It was suspended from a cord tied off on a pier. (R.A. 44, 45, 46) It hung down over the water and was positioned over the head of the plaintiff. (R.A. 42, 45)

The plaintiff was injured while in the process of moving the aforesaid raft and looking up at the bulb. (R.A. 42, 45) He did not have an opportunity to inspect the bulb prior to explosion and was not involved in securing the lighting equipment to the pier. (R.A. 39-45, 119, 158, 223) The plaintiff was unable to see or inspect the condition of the lighting equipment because of both darkness and bulb positioning. (R.A. 42-45, 119, 148, 172)

VI

History of Proceedings

Subsequent to the injury, the plaintiff commenced separate suits against McKie Lighter Co., Inc. and Bethlehem Steel Corporation. As against McKie Lighter Co., Inc., the plaintiff alleged causes of action under the Merchant Marine Act of 1920, 46 U.S.C. §688 (1970) (hereinafter the Jones Act) and the General Maritime Law for unseaworthiness, maintenance and cure. As against Bethlehem Steel Corporation, the plaintiff alleged negligence. Jurisdiction of the McKie action was founded on both 46 U.S.C. §688 (1970) and 28 U.S.C. §1333 (1970). Jurisdiction of the Bethlehem action was based on 28 U.S.C. §1332 (1970). Both actions were brought and consolidated for trial in the United States District Court for the District of Massachusetts.

The jury returned verdicts of $275,000 against both defendants, jointly and severally. However, the District Court entered judgments notwithstanding the verdicts in favor of both defendants on May 23, 1972. The Court ruled that the raft on which the plaintiff was injured was not a vessel. Furthermore, the evidence was such as to require the application of state law on the issue of Bethlehem's negligence. Any cause of action for negligence arose outside the scope of admiralty and maritime jurisdiction. The plaintiff was unable to sustain his burden of proof under state law.

The plaintiff appealed the entry of the aforesaid judgments to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. §1291 (1970). On April 9, 1973, said Court of Appeals affirmed the rulings of the District Court.

A Petition for Rehearing was filed with the United

States Court of Appeals on April 23, 1973. Said petition was denied on May 10, 1973.

VII

Considerations Governing Review on Certiorari

The decision of the Court of Appeals for the First Circuit sought to be reviewed falls within the scope of Rule 19 of the Rules of the Supreme Court of the United States, and this petition should be allowed.

In particular, the decision conflicts with decisions of other Courts of Appeal on the same matter. Other appellate decisions have held a raft to be a vessel.

> Compare *Kenny* v. *New York*, 108 F.2d 958 (2nd Cir. 1940); *United States* v. *Moran Towing & Transportation Co.*, 374 F.2d 656 (4th Cir. 1967); *Peck* v. *U. S. Steel Corp.*, 315 F. Supp. 905 (Minn.), aff'd 446 F.2d 891 (8th Cir. 1970) where rafts were held to be vessels with *Cook* v. *Beldon Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973) where raft-like object was not a vessel. Note that district courts are in hopless confusion. Compare, e.g., *United States* v. *One Raft of Timber*, 13 F. 796 (S.C. 1882); *Muntz* v. *A Raft of Timber*, 15 F. 555 (E.D. La. 1883); *Seabrook* v. *Raft of Railroad Ties*, 40 F.596 (S.C. 1889); *Charles Barnes Co.* v. *One Dredge Boat*, 169 F. 895 (E.D. Ky. 1909); *Tregoning Boat Co.* v. *United States*, 15 Cust. Ct. 196, C.D. 971 (1945) where raft-like objects were classified as vessels with *Raft of Cypress Logs*, Fed. Cas. No. 11, 527 (W.D. Tenn. 1882); *Moores* v. *Louisville Underwriters*, 14 F. 226 (W.D. Tenn. 1882); *Berton* v. *Tietjen & Lang Dry Dock Co.*, 219 F. 763 (N.J. 1915) where raft-like objects were held not to be vessels.

No other appellate decisions have found a lack of admiralty and maritime jurisdiction under similar facts.

> See generally *Stafford* v. *Perini Corporation*, 475 F. 2d 507 (1st Cir. 1973); *Biggs* v. *Norfolk Dredging Company*, 360 F.2d 360 (4th Cir. 1965); *Stanley* v. *Guy Scroggins Construction Co.*, 297 F.2d 374 (5th Cir. 1961) where persons doing similar work had causes of action arise in admiralty. See also *United States* v. *Bruce Dry Dock Co.*, 65 F.2d 938 (5th Cir. 1933) and *The Bart Tully*, 251 F. 856 (6th Cir. 1918) where causes of action arose in admiralty without the involvement of "vessels".

This decision concerns an important question of federal law which has not been, but should be settled by this court. This decision defines the extent of admiralty and maritime jurisdiction when a person is injured aboard a non-vessel on navigable waters. The issue as stated was specifically reserved under the recent decision in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 253 (1972). Lower federal courts have reached conflicting conclusions on this issue since the *Executive Jet* decision.

> Compare *Powers* v. *Bethlehem Steel Corporation*, No. 72-1197 (1st Cir. April 9, 1973) with *Hark* v. *Antilles Air Boats, Inc.*, 41 U.S.L.W. 2506-07 (V.I. 1973).

This decision concerns two federal questions and conflicts with the applicable decisions of this court. First, this court has ruled that a raft similar to the one at bar may be a vessel for the purposes of applying the General Maritime Law.

> *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638 (1900). See also *New Bedford Dry Dock Co.* v. *Purdy*, 258

U.S. 96 (1922); *Nogueira* v. *New York, N.H. & H.R.R.*, 281 U.S. 128 (1930).

The decision of April 9, 1973 did not hold the raft at bar to be such a vessel.

Second, this court has ruled that persons performing the same work as the plaintiff performed herein were involved in maritime service and engaging in maritime activity.

Grimes v. *Raymond Concrete Pile Co.*, 356 U.S. 252 (1958).

The decision of April 9, 1973 held that the plaintiff was not engaged in a maritime service or activity.

As a result, certiorari should be granted.

VIII

Argument

I. A Raft May Be a Vessel for the Purposes of the General Maritime Law.

Vessels are defined as:

". . . . floating structures capable of transporting something over water."

Gilmore & Black, The Law of Admiralty 30 (1957). See also 1 U.S.C. § 3 (1970); 19 U.S.C. §1401 (a) (1970); 46 U.S.C. § 801 (1970); *Pleason* v. *Gulfport Shipbuilding Corporation*, 221 F. 2d 621 (5th Cir. 1955); 7A Moore's Federal Practice 2311-14 (1972).

Several decisions have specifically considered the question of whether or not a raft is a "vessel". In *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638 (1900), the Supreme Court held that a raft could be a vessel for the purpose of invoking admiralty jurisdiction to establish a lien for towage. Similarly, a raft could be a vessel for the purposes of making awards for salvage and enforcing the rules of navigation.

Muntz v. *A Raft of Timber*, 15 F. 555 (E.D. La. 1883); *United States* v. *A Raft of Timber*, 13 F. 796 (S.C. 1882).

Construction and shape do not appear to be determinative. In *United States* v. *Moran Towing & Transportation Co.*, 374 F.2d 656, 663 (4th Cir. 1967), it was strongly suggested that a wooden raft came within the definition of "vessel" provided in 1 U.S.C. § 3 (1964). Similarly, a raft composed of cross-ties lashed together was held to be a "vessel" in *Seabrook* v. *Raft of Railroad Cross-Ties*, 40 F. 596 (S.C. 1889). In *Tregoning Boat Co.* v. *United States*, 15 Cust. Ct. 196, C.D. 971 (1945) a "lifeboat" 17 feet long, 7 feet wide and only 30 inches deep shaped in a manner remarkably like a raft was also ruled to be a "vessel".

See generally, *New Bedford Dry Dock Co.* v. *Purdy*, 258 U.S. 96 (1922) (car float); *Nogueira* v. *New York, N.H. & H.R.R.*, 281 U.S. 128 (1930) (car float); *Kenny* v. *New York*, 108 F. 2d 958 (2nd Cir. 1940) (scow used as fireworks platform); *Offshore Company* v. *Robinson*, 266 F. 2d 769 (5th Cir. 1959) (submersible oil drilling rig); *Peck* v. *U. S. Steel Corp.*, 315 F. Supp. 905 (Minn.), aff'd 446 F. 2d 891 (8th Cir. 1970) (barge without motive power of its own); *Colby* v. *Todd Packing Co.*, 77 F. Supp. 956 (Alaska 1948) (floating fish trap of logs); *Miller* v. *Thomas M. Zowe, Jr. & Associates, Inc.*, 328 F. Supp. 54 (Ark. 1971) (16 foot flat bottomed boat); *Charles Barnes Co.* v. *One Dredge Boat*, 169 F. 895 (E.D. Ky. 1909) (floating structure supporting pump); *Guilbeau* v. *Falcon Seaboard Drilling Co.*, 215 F. Supp. 909 (La. 1963) (submersible oil drilling rig).

The test is simply whether or not the craft is used for transportation.

> *The General Cass,* Fed. Cas. No. 5307, p. 170 (E.D. Mich. 1871); *The Pioneer,* 30 F. 206 (E.D.N.Y. 1886).

Certainly the facts of this case indicate that the raft at bar qualified as a "vessel". It was repeatedly used to transport men and equipment over navigable waters. It was propelled by oar-like sticks operated by men aboard the raft, lines which were pulled or released by men aboard the raft and tugs which towed the raft.

A decision holding that a raft could not be a vessel as a matter of law would have the result of condoning the use of "makeshift" and perhaps unsuitable water craft in place of more seaworthy and substantial barges or scows. The defendant has used a "makeshift" vessel for economic reasons and now claims that this economy measure may constitute a method of avoiding liability for injuries.

> See generally *Brinegar* v. *Iron Ore Construction Company,* 302 F. Supp. 630 (E.D. Ark. 1969) (makeshift pontoon oil carrier held to be a vessel and therefore unseaworthy when capsized and paralyzed plaintiff.)

At the very least, the question of whether or not a raft it a vessel should be left to a jury sitting pursuant to the Jones Act.

> *Braniff* v. *Jackson Avt. — Gretna Terry, Inc.,* 280 F. 2d 523, 526-27 (5th Cir. 1960); *Offshore Drilling Company* v. *Robison,* supra.

II. THE PLAINTIFF'S CAUSE OF ACTION AGAINST THE BETHLEHEM STEEL CORPORATION AROSE WITHIN THE SCOPE OF ADMIRALTY AND MARITIME JURISDICTION, AND THE GENERAL MARITIME LAW SHOULD HAVE BEEN APPLIED.

(a) The raft was not ". . . . an extension of the pier, itself an extension of the land."

> *Powers* v. *Bethlehem Steel Corporation,* No. 72-1197, p. 8, (1st Cir. April 9, 1973).

A pier is defined as ". . . . a projecting quay, wharf, or other landing place."

> *The Haxby,* 94 F. 1016 (E.D. Pa. 1899). See also, 94 C.J.S. § 1; *John J. Lesnon Co.* v. *U. S.,* 182 F. 573 (9th Cir. 1910), cert. denied 220 U.S. 609 (1911).

There was no evidence before the Court of Appeals that suggested that the raft on which the plaintiff was injured was intended to be used as a "landing place". While it may be conceded for the purposes of this section of the argument that the aforesaid raft was not a vessel,

> *Cook* v. *Belden Concert Products, Inc.,* 472 F.2d 999 (5th Cir. 1973)

it is not conceded that it was part of a pier. As the Court of Appeals pointed out in its April 9, 1973 Opinion, the raft was often used as a work platform whose mission was unrelated to "landing" operations.

No case has been found by the petitioners which provides a precedent for "grafting" a raft to a pier. Even the *Cook* decision failed to go so far. In fact, the *Cook* decision only held that such a raft or work platform was

not a vessel. It did not hold that it was a pier or extension thereof.

The effect of the April 9, 1973 Opinion is undesirable in that it destroys uniformity of maritime law and encourages inconsistency of jurisdiction. In *Spratley* v. *Tidewater Construction Corporation,* 238 F. Supp. 650 (E.D. Va. 1965), a pile driver on a barge was permitted to proceed in admiralty. There was no attempt to graft the barge to the piles so as to remove admiralty jurisdiction. In *Biggs* v. *Norfolk Dredging Company,* 360 F.2d 360 (4th Cir. 1965), there was no suggestion that the barge serving as a work platform became part of the bridge. In *Grimes* v. *Raymond Concrete Pile Co.,* 256 U.S. 252 (1958), the Court did not even suggest that the barge was an extension of pilings driven into the ground. Consequently, all of these cases were permitted to proceed in admiralty.

See also *Stafford* v. *Perini Corporation,* 475 F.2d 507 (1st Cir. 1973); *Stanley* v. *Guy Scroggins Construction Co.,* 297 F. 2d 374 (5th Cir. 1961).

(b) Admiralty jurisdiction exists without the presence of a vessel.

One of the most significant differences between the plaintiff's case against McKie Lighter Co., Inc., and that against Bethlehem Steel Corporation was the necessity of proving the existence of a vessel. As against McKie, the plaintiff had to establish the presence of a vessel in order to claim crewmember status as well as a breach of the warranty of seaworthiness. As against Bethlehem, however, the plaintiff only had to demonstrate that his injury was sustained on navigable waters. The presence of a vessel was not required to invoke admiralty and maritime jurisdiction and the consequent application of the General Maritime Law for negligence.

It is well settled that admiralty jurisdiction in non-aviation cases depends solely on the situs of the injury.

Executive Jet Aviation, Inc. v. *City of Cleveland,* 409 U.S. 253 (1972); *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971), reh. denied 92 S. Ct. 731 (1972); *Nacirema Operating Co., Inc.* v. *Johnson,* 396 U.S. 212 (1969), reh. denied 397 U.S. 929 (1970); *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469 (1922); *Atlantic Transport Co.* v. *Imbrovek,* 234 U.S. 52 (1913).

The presence of a vessel is not required.

Atlantic Transport Co. v. *Imbrovek,* supra; *Executive Jet Aviation, Inc.* v. *City of Cleveland,* supra.

It is sufficient that a "marine object" be involved.

McWilliams Dredging Co. v. *United States,* 105 F. Supp. 582 (E.D. La. 1952).

Accordingly, non-vessels such as floating pontoon wharves

The Bart Tully, 251 F. 856 (6th Cir. 1918)

floating dry docks

United States v. *Bruce Dry Dock Co.,* 65 F. 2d 938 (5th Cir. 1933)

floating elevators

The Hezekian Baldwin, 8 Ben. 556, Fed. Cas. No. 6449

and floating rafts

McWilliams Dredging Co. v. *United States,* supra at 588,

have been held to be the subject of admiralty and maritime jurisdiction. No decision cited by the Court of Appeals in its opinion of April 9, 1973 is contrary to this analysis.

Precedent cited in the *Cook* opinion is supportive of the above contention. The decision in *The Robert W. Parsons*, 191 U.S. 17 (1903), was relied upon heavily in *Cook* and is typical in reasoning. In that case, the Supreme Court was faced with the question of whether or not a canal boat was a vessel for the purpose of recognizing a maritime lien for dry dock repairs. In the course of resolving that issue, the Court considered first the nature of a vessel and second the extent of admiralty jurisdiction. With reference to the first issue, the Court found that floating dry docks, floating wharves, ferry bridges, gas floats and sailors' bethels were not vessels for the purposes of enforcing maritime liens. Since only a vessel could be the subject of a maritime lien, there was no object over which an Admiralty Court could exercise its jurisdiction.

With reference to the second issue, however, the Court expressly recognized that repairs performed on a floating dry dock were within admiralty jurisdiction as being performed on navigable waters. Even though the dry dock was not itself a vessel, activities performed on said dry dock were within admiralty jurisdiction.

(c) The plaintiff was associated with a maritime service and performing maritime activity.

The Supreme Court has recognized admiralty and maritime jurisdiction where there is a marine service,

Atlantic Transport Co. v. *Imbrovek*, supra at 61, 62.

or marine activity.

Executive Jet Aviation, Inc. v. *Cleveland, Ohio*, supra.

Ample evidence was either offered or introduced to establish both elements herein.

The plaintiff was engaged in servicing pilings supporting piers. Testimony of Willard Appley, an expert called by the plaintiff, was offered to the effect that it was the custom and practice of seamen to engage in such work. Said expert was also prepared to testify that such servicing was traditionally performed by seamen aboard scows, lighters, barges and other similar vessels. Said testimony was, however, excluded. Jack Ward, another expert called by the plaintiff, was prepared to testify that the rafts on which the plaintiff worked were used as if they were true vessels. This evidence was also excluded. The plaintiff was permitted to testify that the raft on which he was injured was moved over navigable waters almost daily and that he assisted in said navigation. Lastly, all construction work performed by the plaintiff promoted shipping activity in general through pier maintenance.

Cases previously adjudicated on the basis of similar evidence have included holdings that such activities could qualify a plaintiff as a seaman.

> *Biggs*, v. *Norfolk Dredging Company*, supra; *Grimes* v. *Raymond Concrete Piling Co.*, supra; *Sprately* v. *Tidewater Construction Corporation*, supra; *Stafford* v. *Perini Corp.*, supra; *Stanley* v. *Guy Scroggins Construction Co.*, supra.

Once qualified as a seaman, it is impossible to claim that the plaintiff lacked a nexus to maritime service or maritime activity. The acknowledged nature of a seaman's duties precludes such a claim. The plaintiff was performing a maritime service aboard a maritime object, a raft.

> Note that all of the aforecited cases involved vessels. However, the absence of a vessel in this action does not change the nature or quality of the plaintiff's actions. If such were the case, airplane personnel injured in transoceanic flight would be precluded from recovering in admiralty. See generally, *Hark* v. *Antilles Air Boats, Inc.*, 41 U.S.L.W. 2506-07 (V.I. 1973).

Even if the plaintiff were not performing seaman's duties aboard a vessel in navigation, he still fell within admiralty and maritime jurisdiction because he was engaged in a maritime activity and was hurt on navigable waters.

> See generally, *Grant Smith-Porter Ship Co.* v. *Rohde*, *Gonsalves* v. *Morse Dry Dock & Repair Co.*, supra.

As a result, the plaintiff as a construction worker injured on navigable waters while repairing piers was entitled to prosecute his causes of action in admiralty.

> See generally, *Hess* v. *United States*, 361 U.S. 314 (1960).

If the Court of Appeals is permitted to rule that this cause of action arose outside admiralty and maritime jurisdiction, that Court will destroy the uniformity within the General Maritime Law.

As considered previously, other pile drivers have been entitled to recover in admiralty given facts nearly identical to those established herein. The only distinction between those cases and the one at bar is that in those cases "vessels" were involved while in this case only a "raft" was present. All cases pertained to injuries sustained on navigable waters. All cases pertained to plaintiffs servicing piers positioned in navigable waters. For this Court to permit the Court of Appeals to abandon the "locality" test of admiralty jurisdiction and distinguish the maritime nature of the plaintiff's duties herein from those of other successful plaintiffs is not to look to maritime service or activity but solely to the presence of a vessel. This is

contrary to the present status of our jurisprudence and will destroy the uniformity so carefully molded by the Supreme Court.

Various hypothetical situations may fully demonstrate the problems created by the Opinion of the Court of Appeals. Assume that a vessel is standing off-shore waiting to dock at a pier. However, before the vessel may do so, the pier must be prepared by having fenders affixed to pilings. A seaman is sent from the vessel to affix said fenders. In order to perform his work, the seaman stands aboard a hastily constructed raft on the very waters where the vessel is to be docked. While performing his work on the raft and moving the raft from piling to piling, he is injured as a result of a defect in the raft and the negligence of the pier owner. According to the Opinion of April 9, 1973, this cause of action could not arise in admiralty.

Assume that a person is employed to erect a pier and had served prior to his employment as a pile driver aboard a steel hulled lighter two hundred feet long and seventy feet wide. On this occasion, he is ordered to drive piles from a raft two hundred feet long and seventy feet wide composed of logs. This raft is not designed in such a manner as to be capable of being navigated over great open stretches of water. However, the raft is repeatedly towed over open water. The raft is equipped with heavy pile driving equipment. On a certain day the raft is towed several hundred feet into a shipping channel and moored to a pile. More piles are then driven for the construction of a pier. While piles are being driven, the worker is injured as a result of a defect in the raft and the negligence of the owner of the pier. According to the Opinion of April 9, 1973, this cause of action would not arise in admiralty.

Both of the above hypotheticals pertain to injuries sus-

tained on navigable waters. Both of the above pertain to maritime service and activity. Neither of the above involve a "vessel" as defined in the Opinion of April 9, 1973. Both cases fell within admiralty jurisdiction prior to April 9, 1973. Both cases are now outside the scope of admiralty jurisdiction in the First Circuit. The petitioners can find no decisions in any other jurisdiction which reach a similar result.

IX

Conclusion

The United States Court of Appeals for the First Circuit has rendered a very significant decision which will have a confusing effect on Courts attempting to deal with admiralty and maritime jurisdiction. First, the decision will cause considerable confusion as to what constitutes a vessel. Second, the decision will cause an unreasonable restriction of admiralty and maritime jurisdiction as well as destroy the uniformity of admiralty law. As a result, it is respectfully submitted that the time has come when this Court should define the term "vessel" and guide the lower courts in delineating the scope of admiralty and maritime jurisdiction as it applies to injuries sustained on navigable waters.

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 69-941-C

DONALD E. POWERS

v.

BETHLEHEM STEEL CORPORATION

Civil Action No. 69-942-C

DONALD E. POWERS

v.

McKIE LIGHTER CO., INC.

OPINION

May 23, 1972

CAFFREY, Chief Judge

These two civil actions, both of which arose out of the same industrial accident, were consolidated for purposes of trial. A six-day jury trial was had and the defendants in both cases moved for a directed verdict pursuant to Rule 50, Federal Rules of Civil Procedure, both at the end of plaintiff's cases and at the conclusion of all the evidence. Both cases were submitted to a six-person jury under leave reserved and the jury returned a verdict for plaintiff in each case in the amount of $275,000. So much of the case as involved a claim-over by Bethlehem Steel against McKie Lighter in the event the jury found against Bethlehem was withdrawn from the consideration of the jury by stipulation of counsel for McKie and Bethlehem and submitted for determination by the Court.

Taking the evidence in the light most favorable to plaintiff, it appears that a contract was entered into between Bethlehem Steel and McKie Lighter on July 12, 1966.

The contract provided for McKie to do certain work to repair concrete pilings of Pier 3 and to repair and replace the fender system of Pier 2 at the Boston shipyard of Bethlehem Steel. Under the contract, McKie was to install concrete jackets on 53 concrete piles which supported the pier. This involved wire brushing all existing resteel and concrete surfaces coming in contact with the new work, installing removable steel and concrete forms, and furnishing and placing reenforcing steel and concrete.

Plaintiff Donald E. Powers is presently 38 years of age. At the time of the accident he was 33. He was then and is now a member of Local 56, Carpenters and Piledrivers Union. He has not at any material time ever been a member of the National Maritime Union. His employment as a piledriver immediately prior to his job at Bethlehem Steel involved piledriving work at the Boston City Hospital; in Harvard Square, Cambridge; and at the Merchants National Bank on State Street, Boston. There was no evidence that Mr. Powers did any work of any kind on the high seas or on or near the waterfront prior to the work at the Bethlehem shipyard. There was evidence that he and other employees of McKie had worked at the Bethlehem yard in 1966. Powers himself began working at Pier 2 in August of 1966, replacing fenders along the side of the pier. He also worked on Pier 3 during August and September 1966, as a member of a group of McKie employees who were replacing some condemned concrete pilings. The work continued through December of 1966, and part of this time Powers worked as McKie's foreman. When it became necessary for the McKie employees to work on the under-side of the pier, or on the side of the pilings which was accessible only from underneath the pier, they used either of two rafts as platforms. One raft was 4 feet wide and 25 feet long. The other was 10 feet wide and 25 feet long. They were

made of 12 x 12 timbers, lashed or bolted together. They had no decking or protective edge. It appears from the evidence that at all times during the performance of the contract these rafts were tied by lines either to the side of the pier or to pilings supporting the pier, and that they were maneuvered in under the pier and out alongside the pier by pulling on the lines or by hand-grabbing the pilings and pulling thereon while standing on the rafts. The line-pulling was done either by one or two men standing on the raft or by men standing on the pier. These rafts contained no means of self-propulsion, no power, no navigational equipment, no lights, no sleeping quarters, no permanently affixed equipment of any kind. Because of the shadow cast by the pier, artificial lighting was necessary to illuminate the area in which work was being done under the pier. For this purpose, extension lights were plugged into a source of electricity on the pier and allowed to dangle over either side of the pier. On the day of the accident, either Powers himself or one of his co-workers had plugged in two extension cords, owned and supplied by Bethlehem Steel, one of which was dropped over the harbor side and the other over the land side of Pier 3, at approximately the place where the two rafts were tied up and where the crew was about to begin working.

Shortly after six o'clock on the morning of October 6, 1967, Powers and Ward, another McKie employee, went down a ladder onto the 4′ x 25′ raft. Powers testified that as he stood on the raft an electric light bulb which was in a socket at the end of an electrical cable was approximately 10 to 12 feet directly over his head, that he looked up toward the bulb, and almost immediately thereafter the light bulb exploded causing several fragments to penetrate his left eye. After many hospitalizations at the Massachusetts Eye and Ear Infirmary this eye was enucleated.

Neither Powers nor anyone else who testified gave any evidence whatsoever as to the cause of the light bulb's exploding. Powers, however, did testify that during the many months in which he had previously worked on the Bethlehem Steel premises as an employee of McKie, other light bulbs had "popped" and that he was aware of several prior explosions.

I. *As to Bethlehem's Motion for a Directed Verdict*

There was no evidence adduced at the trial that any object of any kind struck the light bulb, that any force or trauma was applied to the light bulb from any exterior source, nor was there any evidence that the bulb itself ever touched the water or the harbor or any other substance or thing external to the bulb. There was likewise no evidence of any electric current abnormality, voltage drop, current increase, or any other occurrence which could be characterized as an electrical abnormality of any sort which could conceivably have contributed to the explosion of the light bulb. Nor was there any evidence on the basis of which a finding could be made that Bethlehem knew or should have known that this bulb would explode.

It is clear that the relationship between Bethlehem and plaintiff was that of an owner of land to an employee of an independent contractor hired by the landowner to do work on his premises. It is equally well-settled that in a diversity case the federal court will apply the law of the state in which it sits, including its law of Conflict of Laws. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Sampson* v. *Channell*, 110 F.2d 754, 760-61 (1 Cir. 1940); *Juliano* v. *Hobart Mfg. Company*, 200 F. Supp. 453, aff'd. 303 F.2d 830 (1 Cir. 1961). There is no question but that a Massachusetts court would apply Massachusetts law to the facts of this case. *Lima* v. *Pennsylvania R. Co.*, 105 F. Supp. 97, 98 (D. Mass. 1952); *Strogoff* v. *Motor*

Sales, Inc., 302 Mass. 345, 347 (1939); *Restatement of Conflict of Laws, Second*, Ch. 7, sec. 146.

Recent Supreme Judicial Court decisions, including *Burr* v. *Massachusetts Electric Co.*, 356 Mass. 144 (1969) have reiterated the long standing rule that:

> "The defendant, thus, owed him the same duty as it owed its own employees, and that duty was to disclose hidden defects of which the defendant was aware or of which in the exercise of reasonable care it should have known. Except in cases of hidden defects, the employer owes no duty to alter the conditions where the work is to be done or to make them safe for the employee. *Williams* v. *United Men's Shop, Inc.*, 317 Mass. 319, 320; *Sparkes* v. *Kepnes*, 339 Mass. 349, 351." (p. 147.)

The Court, in *Burr*, then made an observation which is dispositive of the instant case (also at p. 147):

> "There was no hidden defect here. Burr knew of the existence and location of the wires; and even if not warned of their danger, he should have realized that they might be energized. There is no duty to warn of dangers which are obvious...."

On Powers' own testimony, he knew that light bulbs without reflectors or metal protective cages were being used on this job. He also knew and testified that these bulbs "popped" from time to time. There is no evidence as to what caused the bulb which injured him to pop, and there likewise is no evidence, direct or circumstantial, from which a finding could be made that any latent defect was involved herein since plaintiff himself testified to his awareness of the condition he now says caused his injury. Further, even if on some theory not apparent to this court a bulb which exploded for an unknown reason could be considered a latent defect within the meaning of Massachusetts law, the plaintiff still may not prevail as there

is not a scintilla of evidence in this case to form a basis for a finding that defendant knew, or with the exercise of reasonable care should have known, of its existence. Accord: *Gobern* v. *Metals and Controls, Inc.*, 418 F.2d 290 (1 Cir. 1969).

Paraphrasing the above-quoted language from *Burr* to fit the facts most favorable to plaintiff, the paragraph would read:

> "There was no hidden defect here. Powers knew of the existence, condition, and tendency to occasionally explode on the part of the unprotected light bulbs. There is no duty to warn of dangers which are obvious."

Accordingly, the motion of defendant Bethlehem Steel Corporation for a directed verdict is allowed.

II. *As to McKie's Motion for a Directed Verdict*

On the evidence in this case, the relationship between Powers and McKie was that of employee and employer, and it is clear that based on this relationship Powers filed a claim against McKie pursuant to the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §901, et seq. It is also clear that Powers received an award pursuant to his claim for compensation as a harborworkers in the amount of approximately $39,000. A portion of the Longshoremen's and Harborworkers' Act, 33 U.S.C. §905, provides in pertinent part:

> "The liability of an employer prescribed in §904 of this title shall be *exclusive* and *in place of* all other liability of such employer to the employee." (Emphasis added.)

If this plain language of Congress means anything at all, it means that a person in the position of the plaintiff herein who files a claim for compensation *qua* harborworker, who testifies at that hearing under oath (as Powers while under cross-examination admitted he did) that he

told the Commissioner who conducted the hearing on his compensation claim that he always was a piledriver, has precluded himself from thereafter seeking to enforce any other type of liability upon his employer. In short, the statute provides that having exercised rights under the Longshoremen's and Harborworkers' Compensation Act, plaintiff has made what Congress has ordained to be a binding election among possible remedies. That plaintiff and his counsel should realize the binding nature over and above the direct and unambiguous language of 33 U.S.C. §905 quoted above, is further evidenced by the language in §903(a), Title 33, which states in relevant part:

> "No compensation shall be payable in respect of the disability or death of (1) a master or member of a crew of any vessel."

If Powers was, in fact, a member of a crew of a vessel at the time of the accident, this supposed fact was certainly known both to Powers and his counsel at the time he or they made the decision to pursue his remedies under the Longshoremen's and Harborworkers' Compensation Act and seek a remedy which Congress had withheld from seamen.

That remedies to a single plaintiff against his employer are not available under both the Jones Act and the Longshoremen's and Harborworkers' Compensation Act has been specifically held by the Court of Appeals for the Fifth Circuit in *Bodden* v. *Coordinated Caribbean Transport, Inc.*, 369 F.2d 273 (1966). See, also, *Moore Dry Dock* v. *Pillsbury*, 100 F.2d 245, 247 (9 Cir. 1938); and *Dixon* v. *Oosting*, 238 F. Supp. 25, 27 n.1 (E.D. Va. 1965). The Court of Appeals for the Fifth Circuit likewise has ruled that a longshoreman who has recovered against his employer under the Compensation Act may not thereafter impose Jones Act liability upon his employer. *Ocean*

Drilling & Express Co. v. *Berry Bros. Oilfield Service*, 377 F.2d 511 (5 Cir. 1967).

Substantially the same ruling, adverse to petitioner, was handed down as the law in this Circuit in *DeMartino* v. *Bethlehem Steel Co.*, 164 F.2d 177 (1 Cir. 1947), a case in which the Court of Appeals ruled, in substance, that exercising the option to impose liability on one's employer under the Compensation Act is a legally binding election which precludes subsequent resort to the Jones Act as against the employer.

Over and above the statutory preclusion just discussed, and as a separate, independent and additional ground for this decision, I rule that there was no evidence on the basis of which plaintiff could be found by a jury to have been a seaman or to have been engaged in work on a vessel. It is well-established law that whether or not a person is a seaman depends on the nature of his duties and whether or not they are maritime in character. *Gale* v. *Union Bag & Paper Co.*, 116 F.2d 27 (5 Cir. 1940). Plaintiff's duties are described as follows in the contract between his employer and Bethlehem Steel:

> "... (McKie Lighter) shall provide for but not limited to the installation of concrete jackets on 53 concrete piles ... consisting of wire brushing of all existing resteel and concrete surfaces coming in contact with the new work, the furnishing and installation of removable steel and concrete forms, the furnishing and placing of all reinforcing steel and concrete, the furnishing and installation of all expansion bolts, wire mesh and other accessories ... necessary to complete the work...."

Applying the test of the *Gale* case, as well as the test set out in *Bodden, supra,* no finding that plaintiff was a seaman could be allowed to stand on the record of this case. In *Swanson* v. *Mara Bros.*, 328 U.S. 1, 5 (1945), the

Supreme Court ruled that in order to recover under the Jones Act the plaintiff must be "a member of a crew of a vessel," and further, that "the ship must be in navigation," that the plaintiff must have a more or less permanent connection with the ship and that his work must be aboard the vessel primarily to aid in the navigation of the ship. Applying these standards to the instant case, it is beyond the stretch of any rational imagination that a 25′ x 4′ x 1′ raft permanently tied to a pier by lines could be considered a ship, in or out of navigation. It is equally clear that plaintiff could not be found to have had a more or less permanent connection with the raft, even if it could be found to be a ship, and the above-quoted contract provisions make it crystal-clear that plaintiff's duties were not primarily to aid in the navigation of the "ship."

Accordingly, because of the statutory provisions and because plaintiff could not be found to be a seaman serving as a member of a crew of a ship, the motion of defendant McKie Lighter Co., Inc. for a directed verdict is also allowed.

The claim-over by Bethlehem Steel against McKie Lighter is dismissed as moot by reason of the allowance of Bethlehem's motion for a directed verdict.

Judgment for the defendants.

(s) Andrew A. Caffrey
Chief Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 69-941-C

DONALD E. POWERS

v.

BETHLEHEM STEEL CORPORATION

Civil Action No. 69-942-C

DONALD E. POWERS

v.

McKIE LIGHTER CO., INC.

JUDGMENT

May 23, 1972

In accordance with Opinion filed this date allowing defendants' motions for a directed verdict in both the above-captioned cases, it is

ORDERED:

Complaints dismissed and judgment for the defendant in each case.

By the Court,

(s) HOPE K. CONNELL

Deputy Clerk

(s) ANDREW A. CAFFREY

ANDREW A. CAFFREY

Chief Judge

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 72-1197

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
BETHLEHEM STEEL CORPORATION,
DEFENDANT, APPELLEE,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

No. 72-1198

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge,*
ALDRICH and CAMPBELL, *Circuit Judges.*

Michael B. Latti, with whom *Robert S. Wolfe* and *Kaplan, Latti and Flannery* were on brief, for appellant.
Leo F. Glynn for appellee, McKie Lighter Co., Inc.
Charles E. Colson, with whom *Cargill, Masterman & Cahill* was on brief, for appellee, Bethlehem Steel Corporation.

April 9, 1973

CAMPBELL, *Circuit Judge.* Appellant Powers, a pile driver employed by McKie Lighter Co., suffered a serious eye

injury as he stood on a McKie-owned raft next to Pier 3 of the Bethlehem shipyard in Boston. McKie was under contract with Bethlehem Steel Corporation, the owner of the pier, to repair the pilings underneath. Powers, who received compensation for the injury under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, commenced separate actions in the district court against McKie, claiming damages under the Jones Act, 46 U.S.C. § 688, and damages and maintenance and cure under general maritime law; and against Bethlehem, under diversity jurisdiction, claiming damages for negligence. The jury returned substantial verdicts against both defendants, jointly and severally. Powers appeals from the district court's entry of judgments notwithstanding the verdicts in favor of both defendants.

Standing under the pier on a raft or "float" owned by McKie, Powers and other workmen would first clean the piles by chipping and sandblasting, and then place a form around them into which concrete would be poured. The raft was about twenty-five feet long and five feet wide. Without deck or railing, it was made of 12 by 12 timbers, bonded together. There were rings for lines at its four corners. The men would descend by ladder to the raft, which when not in use lay tied to the pier, lower to the raft sandblasting equipment, water pumps, and forms to be placed around the pilings, and move the raft under the pier to the piles by poling or pulling on lines attached to the pier. They would tie the raft to a larger raft on opposite sides of a row of piles, and span the rafts with planks, so that they could move between and work around the piles. Lines containing water, air, steam and electricity for cleaning, sandblasting and lighting were led from the pier by the men on the raft to where they were working.

The pier was thirty to forty feet wide. The raft's only movement was from the pier front to the piles underneath

or from one row of piles to another. Even when so moving it was normally attached by at least one line to the pier.[1] It had earlier been towed by a workboat to Pier 3 from Pier 2 and had also been towed through Boston harbor to other jobs.

The lighting for the work area, supplied by Bethlehem, consisted of drop lines with a male plug at one end, plugged into a fuse box, and a socket at the other with a bulb in it. The line would be slung over the side of the pier, and taken under the pier by a workman. Some but not all of the bulbs had reflectors. None had protective covering around them. The bulbs had popped frequently while the men worked, sometimes when Bethlehem supervising employees were present. As late as the week of the accident, a bulb had popped in their presence. Powers had twice complained to the Bethlehem job supervisor, recommending that the bulbs be surrounded with a steel or wire cage, with a piece of plexiglass enclosure. There is no evidence of what response Powers received, if any.

The accident happened before daylight, as Powers, standing on the raft, then attached to the pier, was preparing to move it about twenty feet to piles under the pier.[2] The light cable, supplied by a Bethlehem employee to a McKie employee, lay hanging over the side of the pier, the bulb about ten to thirteen feet above Powers' eye level. The bulb was unprotected. When Powers looked up toward the light, the bulb popped, sending pieces of glass into his eye.

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[1] Sometimes, men on the pier would hold a line to guide the raft under the pier. There was a suggestion in the testimony that at a point when the raft was moving under the pier the man on the pier would drop the line to a man on the raft, but it is clear from the testimony that the raft was unattached to the pier, if at all, for only a matter of minutes.

[2] There is some suggestion in testimony that the raft may actually have commenced its movement under the pier.

This case is one more taking us literally to the water's edge, having to do with the circumstances under which a harbor-worker may become entitled to a seaman's remedies. *See Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971). Recovery under the Jones Act or under the general maritime law for unseaworthiness requires affiliation with a "vessel"—either as a crew member or as one injured aboard doing seaman's work. *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, 4, 7 (1946); *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85, 99 (1946). We believe the raft upon which Powers was injured was not a vessel.

What is a vessel, like who is a crew member, is "except in rare cases", a jury question. *Offshore Company* v. *Robison*, 266 F.2d 769, 780 (5th Cir. 1959). Nevertheless, the broad parameters of definition must be established if the terms are to have content. If what emerges from facts and inferences taken most favorably to the plaintiff[3] cannot be a vessel, the jury may not make it one. *See Thibodeaux* v. *J. Ray McDermott & Co.*, 276 F.2d 42, 46 (5th Cir. 1960); *Hill* v. *Diamond*, 311 F.2d 789, 792-3 (4th Cir. 1962); *Texas Company* v. *Savoie*, 240 F.2d 674, 675 (5th Cir. 1957); *rehearing denied*, 242 F.2d 667 (5th Cir. 1957); *cert. denied* 355 U.S. 840 (1957).

We agree with the 5th Circuit in *Cook* v. *Belden Concrete Products, Inc.*, F.2d , 41 U.S.L.W. 2406 (5th Cir. Jan. 12, 1973), that a floating construction platform secured to land is not a vessel for purposes either of the Jones Act or general maritime law. The non-vessel in *Cook* was a flat-deck barge, 180 by 54 feet, upon which employees fabricated concrete barges. Equipped with pipes and pumps for flooding or evacuating interior compart-

[3] We have considered the evidence in the light most favorable to appellant, including evidence made as an offer of proof after exclusion by the court, and give him the benefit of every favorable inference. *Rainey* v. *Gay's Express, Inc.*, 275 F.2d 450, 451 (1st Cir. 1960).

ments, but without its own propulsion, it was occasionally moved to different positions alongside the dock to pick up materials, would be towed into deeper water to launch completed barges, and had been towed considerable distances. While barges were being fabricated, it was fastened by ropes to the dock. The court said, slip opinion, at 4:

> .... in the instant case the floating construction platform was capable of limited movement and was, in the normal course of its service, towed from point-to-point in navigable waters.... The permanence of fixation, however, is not the criterion which governs the maritime status of floating dry docks and similar structures. As the Supreme Court pointed out in *The Robert W. Parsons* [191 U.S. 17, 30 (1903)] the "determinative factors upon the question of jurisdiction [are] the purpose for which the craft was constructed and the business in which it is engaged"....

Cook, supra, relied on cases emanating from *Cope* v. *Vallette Dry-Dock Company*, 119 U.S. 625, 627 (1887), that a floating dry-dock is not a vessel. *See Atkins* v. *Greenville Shipbuilding Corp.*, 411 F.2d 279, 283 (5th Cir. 1969), *cert. denied* 396 U.S. 846 (1969).[4] In our own case of *DeMartino* v. *Bethlehem Steel Co.*, 164 F.2d 177, 179 (1st Cir. 1947), holding that a floating dock was not a

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[4] Somewhat related is the Supreme Court's classification of a so-called wharf boat as a non-vessel. *Evansville & Bowling Green Packet Co.* v. *Chero Cola Co.*, 271 U.S. 19 (1926). Secured to the shore, with quarters for men aboard and shore based power and plumbing connections, the huge craft was towed each winter to a more sheltered harbor, and had sometimes been towed considerable distances. The statutory "vessel" definition under consideration in that case—"every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"—was virtually the same as that in 46 U.S. § 801, arguably applicable to Jones Act cases. *See* 7A Moore's Federal Practice ¶ .215[4]. The quoted language has never been construed as meaning simply every floating object capable of bearing weight without sinking. *See*, e.g., *Hill* v. *Diamond*, *supra*, 311 F.2d at 792-3.

vessel, we cited *Berton* v. *Tietjen & Lang Dry Dock Co.*, 219 F. 763 (D. N.J. 1915), in which, at 771, the court said,

> ... A stage designed to be used in connection with painting or repairing the side of a vessel would not become [a vessel] merely because it was capable of floating on water, though it were used by workmen in thus painting and repairing, while the same was on the water, rising and falling with the tide, or because it could be moved alongside or around such a vessel, and while being moved was capable of holding such persons and property....

The purpose and business of the present craft was not the transportation of passengers, cargo, or equipment from place to place across navigable waters. It was tied to the pier or its pilings virtually all of the time. Nearly as long as the pier was wide, it was used to provide a stable platform for men repairing defective piles. While so used, it was lashed with the other raft to piles, planks being placed from raft to raft, and was indistinguishable from a permanent floating dock. *See DeMartino* v. *Bethlehem, supra.* Its brief movement consisted of being hauled, poled or paddled from the pier to the piles underneath, or from pile to pile; even when moving it was usually attached to the pier by one or more lines. Its occasional "voyages" —when towed by workboat from one pier to another—were no different from the dragging of a section of floating dock from one location to another. *See Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co., supra,* 271 U.S. at 20-21; *Cook, supra,* slip opinion, at 4-5, n. 5.

Rafts, of course, may be designed or used "to encounter perils of navigation" (*See Evansville* v. *Chero Cola Co., supra,* at 22); if so they may be vessels. *See The Mary,* 123 F. 609 (S.D. Ala. 1903); *United States* v. *Marthinson,* 58 F. 765 (E.D.S.C. 1893); *Seabrook* v. *Raft of Railroad*

Cross-Ties, 40 F. 596 (D.S.C. 1889). But we cannot reasonably describe the present raft as other than a floating stage. Even with men and equipment on it, its movement, amounting mostly to a positioning under the pier incidental to its intended use, was not navigation.

The raft, moreover, was unlike special purpose floating structures whose function requires exposure to the hazards of the sea usually at some distance from the shore, such as barges, dredges, drilling platforms and floating derricks. *See Offshore Company* v. *Robison, supra*, 266 F.2d at 772 (mobile drilling platform with retractable legs, having a raked bow, navigation lights, bitts, anchors, bilge pumps, cranes, and life rafts, located at the time of the accident three miles offshore); *Summerlin* v. *Massman Const. Co. et al.*, 199 F.2d 715, 716 (4th Cir. 1952) (derrick anchored in a river); *Gahagan Const. Corporation* v. *Armao*, 165 F.2d 301, 305 (1st Cir. 1948) (dredge on which crew slept and ate). *Also compare Stafford* v. *Perini Corporation*, No. 71-1221 (1st Cir. March 20, 1973) (construction barge anchored two miles offshore, assumed to be vessel). These navigable craft, like conventional vessels, retain their status even when berthed for long periods or even when resting upon or attached to the bottom. *See Gianfala* v. *Texas Company*, 350 U.S. 879 (1955), *reversing Texas Company* v. *Gianfala*, 222 F.2d 382 (5th Cir. 1955).

It may well be that when a craft not designed or generally used as a vessel is in actual navigation—such as when, unattached to land, it is under tow for an appreciable distance over navigable water—it will temporarily acquire a vessel's status. *See United States* v. *Moran Towing & Transportation Co.*, 374 F.2d 656 (4th Cir. 1967), *Cook, supra*. However, even were the jury on conflicting evidence to have concluded that Powers' injury occurred while the raft was in process of being hauled under the pier, we do

not consider such movement to be navigation.[5] Attached by a line to the pier, the raft remained a work platform while being so maneuvered into position, a distance of about twenty feet. We sustain judgment for McKie.[6]

We next consider whether appellant may be allowed to recover against Bethlehem. We do not agree with him that Bethlehem's negligence is to be determined under general maritime law. *See Kermarec* v. *Compagnie General*, 358 U.S. 625, 628 (1959); *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 259 (1922). Maritime law applies only where the wrong occurring on or over navigable waters "bear[s] a significant relationship to traditional maritime activity." *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 41 U.S. L.W. 4085, 4091 (U.S. Dec. 18, 1972). It would be incongruous to hold that the required relationship existed here, in the face of our conclusion that the raft was not a vessel, but, being a floating work platform, was, in effect, an extension of the pier, itself an extension of the land. *See Victory Carriers, Inc.* v. *Law*, *supra*, 404 U.S. at 206-7. Powers, a landbased piledriver, employed to repair piles from the platform, was injured by a bulb hanging over the pier.

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[5] Besides the short distance from pier to pilings, and the fact the raft remained attached to the pier, we note that piers and docks have traditionally been "deemed extensions of land". *Victory Carriers* v. *Law*, *supra*, 404 U.S. at 206-7. To term movement thereunder of this sort "navigation" would seem as strained as to call the raft a "vessel" or Powers its "crew".

[6] The district court erred in ruling alternatively that § 905 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 901 *et seq.*, barred Powers' action against McKie because Powers had collected compensation and had testified in support of his compensation claim. It was settled, at least before amendment in October, 1972, that § 905 did not bar a longshoreman or harbor worker's action against his employer, who owned the vessel where the injury occurred, despite the worker's having collected compensation. *Reed* v. *The Yaka*, 373 U.S. 410 (1963); *Jackson* v. *Lykes Steamship Co.*, 386 U.S. 731 (1967); *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). *But see* Pub. Law 92-576, 82 Stat. 1251, § 18(a) (1972), amending § 905.

We see nothing either in his occupation or in the circumstance of the accident to invoke the law of admiralty, "designed and molded to handle problems of vessels relegated to ply the waterways of the world." *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra,* 41 U.S.L.W. at 4092.

We thus turn to whether under Massachusetts law the jury could have found that Bethlehem violated a duty owed Powers. A Massachusetts landowner owes to the employees of an independent contractor only the same duty he owes his own employees, "and that duty [is] to disclose hidden defects of which the defendant was aware or of which in the exercise of reasonable care it should have known. Except in cases of hidden defects, the employer owes no duty to alter the conditions where the work is to be done or to make them safe for the employee." *Burr* v. *Massachusetts Electric Company,* 356 Mass. 144, 147, 248 N.E. 2d 492, 495 (1969).[7] This rule, now mitigated in virtually all cases (as in Powers') by comprehensive workmen's compensation laws, was established in an earlier era when the cost of industrial accidents was but rarely imposed on an employer. Whatever its shortcomings, we are bound by it. The defect in the light bulb was not hidden; Powers had noticed bulbs popping and had in fact complained about the danger to Bethlehem employees. That appellant had not seen the light bulb which exploded is unimportant, given his familiarity with the bulbs' propensity to pop and their lack of shielding.[8]

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[7] *See also Barrett* v. *Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971); *DeMartin* v. *New York, New Haven & H. R.R. Co.*, 336 Mass. 261, 143 N.E.2d 542 (1957); *Hannon* v. *Hayes-Bickford Lunch System, Inc.*, 336 Mass. 268, 145 N.E. 2d 191 (1957); *Gallo* v. *Leahy*, 297 Mass. 265, 8 N.E. 2d 782 (1937); *Faverau* v. *Gabele*, 262 Mass. 118, 159 N.E. 738 (1928).

[8] Powers' earlier unheeded requests for shielding indicated that he knew of the likelihood of danger as well as of the possibility of the bulbs' popping. Restatement of Agency 2d, § 521, comment b; § 522.

Appellant's argument that Bethlehem violated a duty to supply safe equipment must fail also, since recovery would depend on Powers' not knowing that the equipment was defective. *Cf. Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, 489 (1878); *White* v. *Newborg*, 208 Mass. 279, 281, 94 N.E. 269, 270 (1911). *See* Restatement of Torts 2d § 496A, comment c(3), § 496C. We thus affirm the judgment for Bethlehem against Powers.

We find merit in none of the appellant's remaining contentions, dealing mostly with the exclusion of evidence at trial. The verdict in his favor cured any possible prejudice before the jury. We ourselves have considered and, for purposes of this decision have accepted in its aspect most favorable to appellant, the excluded proof relative to the status of the raft. Other exclusions, such as of certain evidence relative to his alleged crew status, were harmless in view of our conclusion that the raft was not a vessel. Given our disposition of the case, the district court's unwillingness to allow appellant to amend the complaint could not have been prejudicial.

Affirmed.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 72-1197.

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
BETHLEHEM STEEL CORPORATION,
DEFENDANT, APPELLEE,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

JUDGMENT
Entered: April 9, 1973

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Latti, Glynn and Colson.]

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 72-1198.

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

JUDGMENT
Entered: April 9, 1973

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Latti, Glynn and Colson.]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 72-1197

DONALD E. POWERS

v.

BETHLEHEM STEEL CORP.

v.

McKIE LIGHTER CO., INC.

GENERAL DOCKET

1972

June 9 Record on appeal in two volumes filed and case docketed.

14 Appearance of Michael B. Latti, for the appellant filed. Motion filed. Order (Aldrich, Ch.J.) enlarging the time for filing statement of issues and designation to October 6, 1972, and enlarging the time for filing appendix and brief for appellant to November 1, 1972. Notices mailed.

19 Appearances of Charles E. Colson and Cargill, Masterman & Cahill for appellee Bethlehem Steel Corp. filed.

23 Appearance of Leo F. Glynn for appellee McKie Lighter Co. filed.

Sept. 8 Motion filed. Order (Coffin, Ch.J.) further enlarging time for filing statement & designation to 11/3/72 and for filing brief for appellant & appendix to 11/27/72. Notices mailed.

12 Supplement to record on appeal consisting of five volumes of transcripts filed.

1972

Oct. 5 Motion filed. Order (Coffin, Ch.J.) granting leave to appellant to file a consolidated brief and appendix in this case and in case No. 72-1198. Notices mailed.

17 Supplement to record on appeal consisting of one volume of transcript filed.

27 Statement and designation filed.

Nov. 14 Motion filed. Order (Coffin, Ch.J.) granting leave to Blanchard Press to withdraw temporarily a certain exhibit. Notices mailed.

22 Supplement to record on appeal consisting of certain documents filed.

27 Brief for appellant and appendix in one volume filed.

Dec. 14 Brief for appellee Bethlehem Steel Corp. filed.

18 Brief for appellee McKie Lighter filed.

22 Reply brief for appellant filed.

26 Assigned for hearing at the coming January 1973 session.

1973

Jan. 2 Heard before Coffin, Aldrich and Campbell, JJ.

Apr. 9 Judgment: The judgment of the district court is affirmed. Opinion by Campbell, J. Notices mailed.

18 Verified bill of costs filed by appellee Bethlehem Steel.

19 Verified bill of costs filed by appellee McKie Lighter Co.

23 Petition for rehearing filed.

May 10 Memorandum and Order (Coffin, Aldrich & Campbell, JJ.) denying petition for rehearing. Notices mailed.

17 Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 72-1198

DONALD E. POWERS
v.
McKIE LIGHTER CO., INC.

GENERAL DOCKET

1972

June 9 Record on appeal in one volume filed and case docketed.

14 Appearance of Michael B. Latti, for the appellant filed. Motion filed. Order (Aldrich, Ch.J.) enlarging time for filing the statement and designation to October 6, 1972, and enlarging the time for filing appendix and brief for appellant to November 1, 1972. Notices mailed.

23 Appearance of Leo F. Glynn for appellee filed.

Oct. 3 Motion filed. Order (Coffin, Ch.J.) further enlarging times for filing statement & designation to November 3, 1972 and for filing brief for appellant & appendix to November 27, 1972. Notices mailed.

5 Motion filed. Order (Coffin, Ch.J.) granting leave to appellant to file a consolidated brief and appendix in this case and in case No. 72-1197. Notices mailed.

17 Supplement to record on appeal consisting of one volume of transcript filed.

27 Statement and designation filed.

Nov. 7 Counter-designation filed.

22 Supplement to record on appeal consisting of certain documents filed.

1972

27 Brief for appellant and appendix in one volume filed.

Dec. 18 Brief for appellee McKie Lighter filed.

22 Reply brief for appellant filed.

26 Assigned for hearing at the coming January 1973 session.

1973

Jan. 2 Heard before Coffin, Aldrich and Campbell, JJ.

Apr. 9 Judgment: The judgment of the district court is affirmed. Opinion by Campbell, J. Notices mailed.

19 Verified bill of costs filed by appellee.

23 Petition for rehearing filed.

May 10 Memorandum and Order (Coffin, Aldrich & Campbell, JJ.) denying petition for rehearing. Notices mailed.

17 Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1197.

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
BETHLEHEM STEEL CORPORATION,
DEFENDANT, APPELLEE,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

No. 72-1198.

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

MEMORANDUM AND ORDER
Entered: May 10, 1973

Plaintiff's petition for rehearing addressed to the case against Bethlehem merely seeks to reargue what we plainly understood to be advanced before. Our reliance upon *Executive Jet* could scarcely have caused surprise. It was cited by plaintiff in his supplemental brief, and discussed at oral argument. We were, of course, aware that that case related to an aviation accident; however, its statement of principles relative to the "purely mechanical application

of the locality test" does not stop there. *See* 409 U.S. at 253-261. The cases cited by petitioner, most of them involving vessels or otherwise showing a maritime relationship, do not establish the rule which petitioner would have us adopt—namely, that in non-aviation cases locality is the sole test for determining jurisdiction. The Supreme Court has not so held (*Executive Jet*, 409 U.S. at 258) and any such rule would clearly be inconsistent with the principles of *Executive Jet*. Plaintiff's hypotheticals, better described as "horribles", reach distorted results not dictated by anything said or implied in our opinion.

We adhere to our conclusion that on the facts of this case, even though plaintiff harbor worker was standing on a floating construction platform or raft, making repairs to and receiving injuries from a land connected pier was not traditional maritime activity.

The second ground for the petition is that, allegedly, we erred in stating that none of the bulbs "had protective covering around them." This was plaintiff's own testimony to the jury—"no protective shield, no protective covering." It is true that another witness testified that some bulbs had a "squirrel cage." Such a cage was manifestly to prevent outside trauma to the bulb, not to protect against broken slivers of glass from a spontaneously exploding bulb. But apart from this, Bethlehem did not place the particular lights; it was in a poorer position than plaintiff to know which kind were where. We see nothing which would cause us to alter our previous analysis.

The petition for rehearing is denied.

Enter:

(s) Levin H. Campbell

By the Court:

(s) Dana H. Gallup

Clerk.

[cc: Messrs. Latti, Colson and Glynn.]